PM SECURITIES SDN BHD

v.

TAN HOCK LEONG

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
AHMAD MAAROP JCA
KANG HWEE GEE J
[CIVIL APPEAL NO: W-02-932-05]
3 MARCH 2009

CONTRACT: *Sale and purchase - Shares - Force selling of shares - Failure to force sell shares on eighth day of transaction - Whether in contravention of KLSE rules - Whether appellant in breach of term and condition of agreement*

CONTRACT: *Sale and purchase - Shares - Disposal of shares notwithstanding respondent had deposited shares of substantial value to obtain appellant's indulgence - Whether there was a breach of contract on part of the appellant - Whether respondent suffered losses*

The appellant was the respondent's stockbroker for the sale and purchase of shares at the Kuala Lumpur Stock Exchange (KLSE) pursuant to an application to open an Individual Account Agreement (the application) signed by the respondent and accepted by the appellant. The dispute between the parties arose from the purchase of 13 counters of the KLSE which the defendant failed to pay for on the seventh day of purchase after the day of transaction (T+7) under r. 8 of the Rules For Trading By Member Companies. The appellant had forced sold the shares in the open market not on the eighth day but at a later date. The loss which the appellant was claiming was quantified at RM46,271.62. The respondent's defence was premised on the contention that (i) in respect of the counters 2, 3, 4, 5, 6, 7 and 13 (the first group) the appellant failed to sell it on the eighth day in contravention of the KLSE Rules under which both the parties had agreed to adopt as a term of the agreement; (ii) in respect of the counters 9, 10, 11 and 12 (the second group) the appellant proceeded to dispose of all the shares notwithstanding that the appellant had agreed to withhold the sale upon the respondent depositing with the appellant as security 10 lots of Landmarks shares and five lots of Kemunting shares. For

A the aforesaid reasons, the respondent claimed he suffered losses and counterclaimed for special damages of RM58,030.50 arising out of breach of contract on the part of the appellant with costs and interests.

B **Held (dismissing appellant's claim; allowing respondent's counterclaim)**
Per Kang Hwee Gee J delivering the judgment of the court:

(1) It was mandatory for the appellant to force sell the first lot on the eighth day of transaction (T+8) as the term had not been C varied (*Sime Securities Sdn Bhd v. Anthony Lee Sin Choy*). The appellant had failed to comply with r. 8 in failing to force sell off the first group of shares on T+8. Time was clearly of the essence and by failing to dispose of them the appellant was in breach of a term and condition of the agreement and should D not therefore be entitled to claim any loss arising therefrom. (paras 10 & 11)

(2) The Landmarks and the Kemunting shares were deposited with the appellant on 28 January 1994. The counters were all sold E off by the appellant without notice between 3 and 4 February 1994, barely six days after the Landmarks and the Kemunting shares were deposited. The appellant may owe a duty to itself to mitigate its own loss by selling them at the most opportune time. But this had to be balanced against the legitimate F expectation of the respondent to grant a reasonable period of indulgence. A mere six days was too soon and therefore unreasonable under the circumstances, given that the respondent had deposited shares of substantial value to obtain the appellant's indulgence. (para 16)

G
Bahasa Malaysia *Translation Of Headnotes*

Perayu adalah broker saham responden bagi jual beli saham di Kuala Lumpur Stock Exchange (KLSE) di bawah permohonan untuk H membuka Individual Account Agreement (permohonan) yang ditandatangani oleh responden dan diterima oleh perayu. Pertikaian di antara pihak-pihak berbangkit dari pembelian 13 kaunter KLSE di mana defendan gagal membayar pada hari ketujuh pembelian selepas hari transaksi (T+7) di bawah r. 8 Rules For Trading By I Member Companies. Perayu telah membuat penjualan terpaksa saham-saham di pasaran terbuka bukan pada hari ke lapan tapi pada tarikh selepas itu. Kerugian yang dituntut oleh perayu ditaksirkan pada RM46,271.62. Pembelaan responden adalah berasaskan hujahan

bahawa (i) mengenai kaunter-kaunter 2, 3, 4, 5, 6, 7 dan 13 (kumpulan pertama) perayu gagal membuat penjualan pada hari ke lapan yang bertentangan dengan undang-undang KLSE di mana kedua-dua pihak telah bersetuju untuk mengambil sebagai syarat perjanjian; (ii) mengenai kaunter 9, 10, 11 dan 12 (kumpulan kedua) perayu meneruskan untuk menjual saham-saham walaupun perayu telah bersetuju menahan penjualan apabila responden mendepositkan dengan perayu sebagai sekuriti sepuluh lot saham-saham Landmarks dan lima lot saham-saham Kemunting. Atas alasan-alasan ini, responden mendakwa bahawa responden mengalami kerugian dan membuat tuntutan balas untuk gantirugi khas RM58,030.50 yang berbangkit dari pelanggaran kontrak dari pihak perayu dengan kos dan faedah.

Diputuskan (menolak tuntuan perayu; membenarkan tuntutan balas responden)
Oleh Kang Hwee Gee H menyampaikan penghakiman mahkamah:

(1) Ia adalah mandatori bagi perayu untuk membuat penjualan secara paksa lot pertama pada hari ke lapan transaksi (T+8) kerana syarat tidak diubah (*Sime Securities Sdn Bhd v. Anthony Lee Sin Choy*). Perayu telah gagal mematuhi r. 8 dalam kegagalannya membuat penjualan secara paksa kumpulan pertama saham-saham pada T+8. Masa adalah intipati perjanjian dan kerana perayu telah gagal menjual saham-saham tersebut perayu telah melanggar terma dan syarat perjanjian dan tidak ada hak untuk menuntut apa-apa kerugian.

(2) Saham-saham Landmarks dan Kemunting telah didepositkan dengan perayu pada 28 Januari 1994. Kaunter-kaunter telah dijual oleh perayu tanpa notis pada 3 dan 4 Februari 1994, enam hari selepas saham-saham Landmarks dan Kemunting telah didepositkan. Perayu mungkin mempunyai tanggungjawab kepada diri sendiri untuk mengurangkan kerugian sendiri dengan menjual saham-saham pada masa yang paling sesuai. Tetapi ini harus diadili berdasarkan pengharapan sah responden untuk membenarkan masa yang munasabah untuk ehsan. Enam hari adalah terlalu cepat dan oleh itu tidak munasabah di dalam keadaan yang sedemikian, memandangkan responden telah mendepositkan saham-saham yang mempunyai nilai tinggi untuk mendapatkan ehsan perayu.

Case(s) referred to:

Associated Pan Malaysia Cement Sdn Bhd v. Sykt Teknikal & Kejuruteraan Sdn Bhd [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15 SC ***(refd)***

Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd [1999] 1 CLJ 89 CA ***(refd)***

Sime Securities Sdn Bhd v. Anthony Lee Sin Choy [2003] 1 CLJ 288 HC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 47, 64

For the appellant - Lam Sam Kit (Ayub Yazid with him); M/s Manjit Singh Sachdev, Mohamad Radzi & Partners

For the respondent - Clinton Gomez; M/s Rajindar Singh Veriah & Co

[Appeal from High Court, Kuala Lumpur; Suit No: D2-22-447-1994]

Reported by Suhainah Wahiduddin

JUDGMENT

Kang Hwee Gee J:

[1] We heard the parties on 3 March 2009 when we dismissed the appellant's claim and allowed the respondent's counter-claim. We intimated that we would provide our written judgment at a later date.

[2] The appellant was the respondent's stockbroker for the sale and purchase of shares at the Kuala Lumpur Stock Exchange (KLSE) pursuant to an application to open an Individual Account Agreement (the application) signed by the respondent and accepted by the appellant.

[3] The opening paragraph of the application read:

> By signing below, I, Tan Hock Leong
>
> (1) request you to open an Account in En. J Securities Sdn. Bhd. (EN: J) and undertake to abide by the Rules and Regulations of The Kuala Lumpur Stock Exchange ("The KLSE") and any relevant regulations governing the purchase and sale of shares quoted on The KLSE being in force and any subsequent new rules or regulations that may be brought into force from time to time. A copy of such rules and regulations can be made available to me.

[4] The Rules and Regulations of the KLSE in question was r. 8 of the Rules For Trading By Member Companies, which read as follows:

> Selling Out In Relation to the FDSS (From sub-reg 3 of FDSS of Members' Circular No 713/1990)
>
> Member companies shall close-off purchase positions of clients who fail to pay for their purchases by 12:30pm on the seventh market day following the date of contract and shall on an immediate delivery basis institute a selling-out by the eighth day the securities or any of the securities for which the client has not made full payment by the said due date. The member companies may at any time thereafter sue such clients for the difference and all losses and expenses consequent upon such selling-out. It shall not be necessary for member companies to give notice of all such selling-out and all damages which the member companies may sustain shall be recoverable from the clients as liquidated damages.

[5] The dispute between the parties arose from the purchase of 13 counters of the KLSE which the defendant failed to pay for on the seventh day of purchase after the day of transaction (T+7) under the above-mentioned rule. Under the same rule the appellant was bound to force-sell the shares in the open market on the 8th day (T+8) if they are not paid for on the seventh day.

[6] It is common ground that the respondent had failed to pay for the shares on T+7 in consequence of which the appellant had forced sold them not on T+8 but at a later date. The various counters were as listed in exh. P2. The loss which the appellant was claiming was quantified at RM46,271.62 as set out in the statement of claim.

[7] The respondent's defence is premised on the contention that:

(i) In respect of the counters 2, 3, 4, 5, 6, 7 and 13 (the first group as listed in exh. P2), the appellant failed to sell it on the 8th day (T+8) in contravention of the KLSE Rules under which both the parties had agreed to adopt as a term of the agreement;

(ii) In respect of the counters 9, 10, 11 and 12 (the second group as listed in exh. P2), the appellant proceeded to dispose of all the shares notwithstanding that the appellant had agreed to withhold the sale upon the respondent depositing with the appellant as security 10 lots of Landmarks shares and 5 lots of Kemunting shares.

[8] For the aforesaid reasons the respondent claimed he suffered loss. He counter-claimed for special damages of RM58,030.50 arising out of breach of contract on the part of the appellant with costs and interest.

[9] We are unanimous in our finding that the learned judge was right in accepting the testimony of the respondent the Landmarks and the Kemunting shares referred to above, were deposited with the appellant "to delay the forced-selling of the shares" of counters 9 to 12 in the list exh. P2. The appellant was not able to produce any evidence to the contrary as the dealer who was assigned to deal with the respondent was not called to give evidence. We are unanimous in our views that the learned judge was also right to segregate for the purpose of his judgment, the counters that ought to be forced sold on the 8th day from those counters that should not have been sold by reason that the appellant had accepted the 10 lots of Landmarks and 5 lots of Kemunting shares as security to postpone the sale at (T+8).

The First Group Of Counters

[10] We agree with the finding of the learned judge that it was mandatory for the appellant to force-sell the first lot on the 8th day of transaction (T+8) as the term had not been varied and we approved of what the *High Court in Sime Securities Sdn Bhd v. Anthony Lee Sin Choy* [2003] 1 CLJ 288 in having to interpret the same r. 8, said at p. 294:

> In the instant case, it is clear that the obligation of the defendant to pay for the purchase of the shares by T+7 had not been varied. It follows therefore, the plaintiff's failure to sell the shares on T+8 as mandated by the KLSE was by its own default. No evidence was adduced as to why the plaintiff only sold the shares some seven months after the date of transaction. One can therefore conclude that the sale could not have been conducted *bona fide* to recover the plaintiff's loss. The plaintiff could not therefore rely on cl (f) to justify the sale of the shares on 13 February 1995.

[11] The learned judge was therefore right in having dismissed the appellant's claim in respect of the first group as the appellant had failed to comply with r. 8 in failing to force-sell off the first group of shares on T+8. Time was clearly of the essence and by failing

to dispose of them the appellant was in breach of a term and condition of the agreement and should not therefore be entitled to claim any loss arising there from.

The Second Group Of Counters

[12] Rule 8 notwithstanding, it is open to a promisee under the general principle of waiver pursuant to s. 64 of the Contracts Act 1950 "to dispense with or remit wholly or in part the performance of the promise made to or to accept any promise he thinks fit him" (see *Associated Pan Malaysia Cement Sdn Bhd v. Syarikat Teknikal & Kejuruteraan Sdn Bhd* [1990] 2 CLJ 913; [1990] 1 CLJ (Rep) 15, [1990] 3 MLJ 287 at 295-296).

[13] Having accepted the deposit of the 10 lots of Landmarks shares and 5 lots of Kemunting shares to forestall the forced selling, the appellant must be taken to have agreed to waive the requirement of r. 8 to force sell on (T+8).

[14] However, as no time limit had been fixed within which the counters could be sold by the appellant should the respondent fail to pay for them, time became at large, in which case the appellant would be bound by the provision of s. 47 of the Contracts Act 1950 which reads:

> Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.
>
> Explanation - The question "what is a reasonable time" is, in each particular case, a question of fact.

[15] Section 47 imposes upon the appellant the obligation to dispose the counters within a reasonable time having regard to all the circumstances of the case. (See *Hock Huat Iron Foundry v. Naga Tembaga Sdn Bhd* [1999] 1 CLJ 89.)

[16] The Landmarks and the Kemunting shares were deposited with the appellant on 28 January 1994. The counters were all sold off by the appellant without notice between 3 and 4 February 1994, barely six days after the Landmarks and the Kemunting shares were deposited. It is true the appellant may owe a duty to itself to

A mitigate its own loss by selling them at the most opportune time. But this has to be balanced against the legitimate expectation of the respondent to grant a reasonable period of indulgence. A mere six days in our view was too soon and therefore unreasonable under the circumstances, given that the respondent had deposited shares of
B substantial value to obtain the appellant's indulgence.

[17] The judgment of the High Court is affirmed.

[18] The appeal is dismissed and the counter-claim is allowed with costs.
C

D

E

F

G

H

I